92-120

No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JOHN W. BANKS II,

Petitioner,

v.

VERNA J. BANKS,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeals For The Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the order reopening petitioner's divorce case to divide his Veterans' Administration disability benefits as community property was void under the Supremacy Clause of the Federal Constitution for lack of subject matter jurisdiction because the anti-attachment provision of the Veterans' Benefits Act (38 U.S.C. §5301), which protects V.A. disability benefits from "any legal or equitable process whatever," completely preempts state court power to treat veterans' disability benefits as community property.

PARTIES

The parties are: Petitioner, JOHN W. BANKS, III, Major, USAF, Ret. and Respondent, VERNA J. BANKS.

Since Petitioner contends that application of California Civil Code §4800(a) to divide his Veterans Administration disability compensation as community property offends Art. VI, Cls. 2 of the United States Constitution, 28 U.S.C. §2403(b) may be applicable, and the Attorney General of the State of California is being served pursuant to Rule 29.4(c) of this Court.

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OPINIONS OF THE LOWER COURTS

In the parties' 1986 divorce, the trial court originally determined Major Banks' V.A. disability benefits were not subject to division as community property and awarded his ex-wife 43.95% of his net military retirement pay. (Appendix [Appen] A; CT 229.)

On May 4, 1987, the trial court reopened the case and found that, pursuant to *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] (1986), Major Bank's must pay his ex-wife 43.95% of his gross military retirement pay, including V.A. disability benefits. (Appen. B; CT 350-353.)

On December 7, 1990, the trial court entered an Order denying Major Banks' motion to set aside the Order that divided his V.A. disability benefits as community property. (Appen. C; CT 510-512.)

On January 31, 1992, in an unpublished Opinion, the California Court of Appeal for the Third Appellate District affirmed, finding the Veterans' Benefits Act (Title 38, U.S.C.) does not preempt state court subject matter jurisdiction. (Appen. D.)

On April 15, 1992, the California Supreme Court denied review without issuing a opinion. (Appen. E.)

JURISDICTIONAL GROUNDS

Major Banks invokes this court's jurisdiction under 28 U.S.C. §1257(3). Major Banks asks the court to determine whether state courts have subject matter jurisdiction to characterize V.A. disability benefits as community property in violation of 38 U.S.C. §5301 and 10 U.S.C. §1408(a)(4), that

put veterans' disability benefits beyond the reach of state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the federal Constitution, the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. § 5301 [former §3101]), the jurisdictional limitation provisions of the Uniformed Services Former Spouses Protection Act (FUSFSPA), (10 U.S.C. §1408(a)(4) and (c)(1)), and the California Statute authorizing collateral attacks on void orders (California Code of Civil Procedure §473.) The statutes are set forth in full in the appendix because of their length. The relevant portions provide:

U.S. Const., Art. VI, Cls. 2:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

10 U.S.C. §1408(a)(4)(B):

> "(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which- * * * "(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law

in order to receive compensation under title 5 or title 38;"

38 U.S.C. §5301 [former §3101]:

(a) "Payment of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments * * *"

California Code of Civil Procedure §473:

"The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

STATEMENT OF THE CASE

Petitioner, John Banks entered the United States Air Force in 1951, and retired as a Major in 1971, after twenty years of service. (Reporter's Transcript [RT], p. 10.) John and Verna Banks were married in 1954, and separated about

17 1/2 years later in 1979. (RT 1, 11, 77.) They were married during 87.9% of the time Major Banks was on active duty with the Air Force. (RT 77.) Major Banks has a 40% disability rating from the Department of Veterans Affairs (V.A.). (RT 11.)

The ex-wife filed a petition for dissolution of marriage in 1979. (CT 1-2.) The marital status was terminated pursuant to a stipulation for bifurcation, with reservation of jurisdiction over all other issues. (CT 100, 104.) Judgment was finally entered January 1, 1986. (CT 224-230.)

The original trial court found Major Banks was awarded a disability rating of 40% by the Veterans' Administration [Department of Veterans Affairs] and determined his military retirement benefits attributable to disability were not subject to division as community property. The ex-wife was awarded 43.95% of Major Banks' **net** military retirement pay. (CT 229.) Judgment was entered on October 31, 1986. (CT 333-335.)

The ex-wife did not appeal or otherwise seek review of the decision that Major Banks' V.A. disability benefits were his separate property. However, after the California Supreme Court decided *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] (1986), but before this court overruled *Casas* in *Mansell v. Mansell*, 490 U.S. 581 [104 L.Ed.2d 675, 109 S.Ct. 2023] (1989), the ex-wife filed a motion to reopen the case on March 2, 1987, seeking division of Major Banks' V.A. disability benefits. (CT 338.)

The trial court did not apply *res judicata* to the original separate property determination. Rather, on May 4, 1987, the court found that, pursuant to *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] (1986), Major Banks must pay his ex-

wife 43.95% of his **gross** military retirement pay, including the V.A. disability benefits. (CT 353.)

In California, the normal and adequate remedy is to violate a void order deliberately, be adjudged in contempt, and then review the contempt order by *habeas corpus*. (See e.g., *Smith Metropolitan Company v. Superior Court*, 16 Cal.2d 226, [105 P.2d 587] (1940).) Review of the resulting contempt order on *certiorari* or *habeas corpus*, is a better remedy than appeal. An appeal would require obedience during the long period until reversal because Major Banks was not able to post a huge bond at the time the reopening order divided his V.A. benefits. Further, after reversal on appeal, he would be faced with the daunting task of recouping the unlawful payments from his ex-wife. Review of a contempt order would make obedience unnecessary.

Therefore, Major Banks elected to ignore the order and defend potential contempt citations. The United States Air Force also tacitly supported this decision by refusing to honor the reopening order.

However, the ex-wife has never brought a contempt action. Perhaps she recognized §5301's absolute defense to contempt, but was hoping for a favorable change in federal law.

She filed five different Orders to Show Cause to set arrearages in the division of V.A. disability benefits because the Air Force would not honor the Modified Judgment or pay her more than 43.95% of the **net** disposable retirement pay as defined in 10 U.S.C. §1408(a)(4). (CT 355-363; 381-387; 396-406; 436; 487.)

After Major Banks received a tort recovery, the ex-wife attached it to offset the Air Force refusal to honor the

reopening order. In response, Major Banks filed the present action pursuant to Code of Civil Procedure §473 to set aside the void reopening order. (CT 438-440.)

After the attachment, Maj. Banks filed the present motion under California Code of Civil Procedure §473, to set aside the void order dividing his V.A. disability benefits. He contends the order is void due to lack of subject matter jurisdiction pursuant to the federal Veterans Benefits Act (38 U.S.C. §5301.) It is also void under the retroactive provisions of §555 of Public Law 101-510. (10 U.S.C. §1408.)

Under California law, a void order is a "dead limb on the judicial tree," which has no provisional or interim effect. (*Svistunoff v. Svistunoff*, 108 Cal.App.2d 638 [239 P.2d 650] (1952).) Void judgments and orders are always subject to collateral attack. (California Code of Civil Procedure §473 [last sentence]; *Summers v. Superior Court*, 53 Cal.2d 295, 298 [1 Cal.Rptr. 324] (1959); *Consolidated Theaters v. Theatrical Stage Employees Union*, 69 Cal.2d 713, 721 [73 Cal.Rptr. 213] (1968); *Costa v. Banta*, 98 Cal.App.2d 181, 182 [219 P.2d 478] (1950).)

Major Banks contended the state court never had jurisdiction over his V.A. disability benefits, and that collateral estoppel did not prevent him from challenging the reopening order at this late date because void orders are always subject to collateral attack. (CT 421-425; 429.)

On December 7, 1990, the court denied the motion to set aside the reopening order that divided Mr. Banks' V.A. disability benefits. (CT 510-512.) On January 31, 1992, the Court of Appeal affirmed, finding the Veterans' Benefits Act does not preempt state court subject matter jurisdiction. Therefore, according to the Court of Appeal, *res judicata*

applies to prevent reconsideration, even though *res judicata* did not preclude the ex-wife from reopening the original judgment. The California Supreme Court denied review on April 15, 1992.

Major Banks seeks review in this court to determine whether the Veterans' Benefits Act (Title 38, United States Code) preempts state subject matter jurisdiction over V.A. disability benefits by virtue of the anti-attachment provisions, 38 U.S.C. §5301, which protect V.A. disability benefits from "* * * any legal or equitable process whatever, * * * *."

ARGUMENT

I
THE ORIGINAL TRIAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO REOPEN THE FINAL PROPERTY DISTRIBUTION

The trial court found it could reopen the original property distribution because *Casas v. Thompson*, 42 Cal.3d 131 [228 Cal.Rptr. 33] determined California courts could apply state law to the federal asset. According to *Casas*, FUSFSPA obliterates *McCarty v. McCarty*, 435 U.S. 210 [101 S.Ct. 2728, 69 L.Ed.2d 589], and allows the states to apply pre-*McCarty* subject matter jurisdictional analyses to military retirement pay.

Ironically, *Casas* severely criticized, without overruling *In re Marriage of Costo*, 156 Cal.App.3d 781 [203 Cal.Rptr. 85] (1984), the only reported California decision that correctly interpreted the Veterans Benefits Act. However, after *McCarty* corrected the *Casas* court's interpretation of federal law, the California courts continued to follow the mistaken *Casas* reasoning, to the exclusion of the correct *Costo* analysis of the Veterans' Benefits Act.

Under the mistaken *Casas* analysis, *In re Marriage of Fithian*, 10 Cal.3d 592 [111 Cal.Rptr. 369] (1974) allows community property treatment of military retirement benefits because there was no federal preemption. *Fithian*, of course, was overruled by *McCarty v. McCarty*, 435 U.S. 210 (1981). However, according to the present California analysis, 10 U.S.C. §1408 retroactively overruled *McCarty*.

However, application of FUSFSPA to eliminate *McCarty* directly conflicts with four Congressional declarations that FUSFSPA is not retroactive. (House Conf. Rpt. 97-749; House Rpt. 100-563; House Rpt. 101-665; and House Rpt. 101-923.)

Further, California's determination of retroactivity directly conflicts with §555(e) of Public Law 101-510, which makes it clear that the new second sentence of 10 U.S.C. §1408(c)(1), withholding subject matter jurisdiction applies to every state court reopening judgment or order, regardless of when the reopening order is entered.

In addition, California's analysis does not recognize that **both issues** addressed by *Casas* are questions of federal law and have been overruled. According to the California Supreme Court, itself, the *Casas* case presented:

> "* * * **two issues** for review: (1) following enactment of the Federal Uniform Services Former Spouses' Protection Act (FUSFSPA), does a California court have the **power to award** a former spouse an interest in a military retiree's pension which was **omitted from an earlier dissolution decree**; and (2) if the court can make such an award, should the division of the pension be based on its 'disposable' (as defined in FUSFSPA) amount or its 'gross' amount? We conclude that the court has the power to award a

former spouse an interest in the 'gross' amount of a military retiree's pension. (*Casas*, *supra*, 42 Cal.3d at 136.)

California completely ignores the fact that *Casas* was overruled on the **net versus gross** issue by *Mansell v. Mansell*, 490 U.S. 581 [104 L.Ed.2d 675, 109 S.Ct. 2023] (1989). And now, *Casas* has been overruled on its other issue, subject matter jurisdiction over "omitted" retirements, by §555 of Pub. L. 101-510. Therefore, California has no basis for exercise of subject matter jurisdiction.

Casas has absolutely no vitality as a tool for analyzing federal law. Both of the *Casas* conclusions have been overruled. *Mansell* settled the "net-versus-gross" question and the retroactivity clause of §555(e) limits subject matter jurisdiction for all judgments, regardless of date. The retroactivity clause provides:

> "EFFECTIVE DATES.-- (1) The amendment made by subsection (a) [*Prohibition of Certain Retroactive Court Orders*] **shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act**." Pub. L. 101-510, Subparagraph (e).)

Thus, California law, as discussed in the trial and appellate courts in the present case, in *Casas*, and in virtually all other California cases is not relevant. The federal restriction of subject matter jurisdiction applies to all judgments.

In re Marriage of Curtis, (1 Civ. A053562) ___ Cal.App.4th ___ [___ Cal.Rptr.2d ___] (June 10, 1992) discusses the effect of Pub. L. 101-510, §555. The *Curtis* court found §555 "curious," and questioned the rationale of

Congress. However, when §555 is viewed in the full light of the entire legislative history of FUSFSPA, Congressional rationale is clear.

Congress never intended to allow state courts to reopen dissolution cases, notwithstanding the legion of state cases that found otherwise. (House Conf. Rpt. 97-749; House Rpt. 100-563; House Rpt. 101-665; and House Rpt. 101-923.) FUSFSPA merely allows division of retirement benefits payable after June 25, 1981, in cases decided after February 1, 1983, unless a prior judgment specifically reserved jurisdiction. All other cases are controlled by *McCarty*, *Mansell*, 10 U.S.C. §1408(c)(1), and 38 U.S.C. §5301.

Even though *Curtis* questioned Congressional rationale in enacting §555, the court correctly observed and held that:

> "**The amendment in fact deprives state courts of subject matter jurisdiction to open pre-*McCarty* dissolutions for the purpose of dividing military retirement benefits.**" (*Curtis*, *supra.*)

Curtis is the first California decision to recognize that state courts have misapplied FUSFSPA for almost ten years. The *Curtis* opinion correctly recognized the Congressional record unequivocally demonstrates the word "treat" in FUSFSPA means "characterize." The word "treat" is not, and never has been, as *Casas* mistakenly determined, a mere limitation on ordering the Service Secretaries to pay former spouses directly.

A state court may not treat [characterize] military retirement pay as community property except in accordance with the limitations of FUSFSPA. (10 U.S.C. §1408(C)(1); *Curtis*, ___Cal.App.4th ___ at n. 9.) For this independent reason, the post-FUSFSPA state court decisions that purported

to exercise jurisdiction based upon state law were mistaken and probably void. (Code of Civil Procedure §473 [last sentence]; *People v. West Coast Shows, Inc.*, 10 Cal.App.3d 462, 467 (1970); *Costa v. Banta*, 98 Cal.App.2d 181, 182 (1950).)

Even the California Court of Appeal that applied *res judicata* to prevent Major Mansell from challenging community property division of his V.A. disability benefits acknowledged that, if subject matter jurisdiction is preempted, then the stipulation and order allowing division would be void. (*Mansell v. Mansell*, 217 Cal.App.3d 219, 225 [265 Cal.Rptr. 227] (1989).) In California, void judgments are always subject to collateral attack. (*County of Ventura v. Tillett*, 133 Cal.App.3d 105 [183 Cal.Rptr. 741] (1982).) As of the time of the *Mansell* remand, Congress had not yet declared, other than in the legislative history, that the subject matter jurisdictional limitations of FUSFSPA apply to all state actions, regardless of their date. Now it has. (Pub. L. 101-510, §555(e).)

FUSFSPA did not obliterate *McCarty*, as some courts have assumed. And, FUSFSPA certainly did not repeal 38 U.S.C. §5301. Public Law 101-510 §§ 555(a) and (e) conclusively establish that FUSFSPA is the only authority that ever existed for community property division of military retirement benefits, and FUSFSPA specifically excludes community property division of V.A. disability benefits. (10 U.S.C. §1408(a)(4).)

Because of FUSFSPA's retroactive jurisdictional prohibition, FUSFSPA completely occupies the field of subject matter jurisdiction over military retirement pay in marital dissolution cases. All purported theories of state-law subject matter jurisdiction are preempted, both prospectively and

retrospectively. Therefore, the reopening order in the present case is void.

II
COMMUNITY PROPERTY DIVISION OF V.A. DISABILITY BENEFITS VIOLATES 38 U.S.C. §5301, WHICH POSITIVELY REQUIRES THAT DISABLED VETERANS ACTUALLY RECEIVE THE BENEFITS

When state action is in conflict with a direct pronouncement of federal law, the state act is invalid, even if the state moves in an area of its general competence. As the Court pointed out in *Ridgway v. Ridgway*, 454 U.S. 46 (1981):

> "Notwithstanding the limited application of federal law in the field of domestic relations generally, (see *McCarty v. McCarty*, 435 U.S. 210, 101 S.Ct. 2728, 2735, 69 L.Ed.2d 589 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-594 (1890)), this court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in federal rights. **** And, specifically, **a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments.**" (emphasis added, *Ridgway*, *supra*, 454 U.S. at 54-55).

If a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity--and this is true even though the state action in question was taken within a sphere in which the states could otherwise act (*Free v. Bland*, 369 U.S. 663, 666 (1962)).

This Court has, on many previous occasions, considered direct conflicts between federal law and state community property laws, and each time resolved the conflict in favor of federal pre-emption (*McCune v. Essig*, 199 U.S. 382 (1905); *Wissner v. Wissner* 338 U.S. 655 (1950); *Free v. Bland*, 369 U.S. 633 (1962); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *McCarty v. McCarty*, 435 U.S. 210 (1981); *Ridgway v. Ridgway*, 454 U.S. 46 (1981) *Mansell v. Mansell*, 490 U.S. 581 (1989)). In the present case there is an entire body of federal law protecting veterans' benefits--Title 38, U.S.C. Thus, there is a clear and substantial federal interest which cannot be served if state community property law intercepts the benefits and awards them to a healthy former spouse.

In the present case, Major Banks waived a portion of his military longevity retirement in order to receive disability compensation from the V.A. (38 U.S.C. §§1110 and 5305). His monthly compensation is **not based on any particular period of service**, but rather is a flat sum determined on the basis of his percentage of disability and impairment of his earning capacity (38 U.S.C. §§1114 and 1155). As a recipient of V.A. disability benefits, Major Banks is fully protected by the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. §5301), which shield disability benefits from every form of legal process, except for child support (*Rose v. Rose*, 481 U.S. 619 [107 S.Ct. 2029, 95 L.Ed.2d 599] (1987).

Section 5301(a) states:

> (a) "Payment of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors,

> and **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary**. ****".(*emphasis added.*)

Language identical to the phrase highlighted above, word for word, was involved in the case of *Wissner v. Wissner*, 338 U.S. 655, 659 (1950), and again in the case of *Ridgway v. Ridgway*, 454 U.S. 46, 52-53 (1981). The *Wissner* Court held that the language prevented the state from applying community property law to reach the federal benefits. As a separate ground for reversal, the *Wissner* Court found that the diversion of future payments to be received by the beneficiary would be a "seizure" prohibited by the anti-attachment provision. (*Wissner, supra.*, 338 U.S. at 659.) The *Ridgway* Court, commenting on *Wissner*, said "*These are strong words and a positive ruling.*" (*Ridgway, supra*, 454 U.S. at 55.)

> Venerable and worthy as this community [the business relationship of man and wife] is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases." (*Wissner, supra*, 338 U.S. at 660).

Five years ago this Court had occasion to comment further on the distinction between support and community property claims. In *Rose v. Rose*, 481 U.S. 619 [107 S.Ct. 2029, 95 L.Ed.2d 599] (1987), the Court discussed the exception to anti-attachment statutes for alimony and child support in a context of *community property*.

> "Consistent with the distinction suggested in *Wissner v. Wissner*, 338 U.S. 655 (1950), Congress had amended the Social Security Act to authorize garnishment of certain federal benefits, including

> railroad retirement annuities, for spousal and child support **but not for community property divisions**. 42 U.S.C. §§659 and 662. We construed these amendments to 'expressly override' the anti-attachment provisions for support claims, finding it 'logical to conclude that Congress * * * thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that **community property claims, which are not based on need, could not do so.**'" (emphasis added, *Rose, supra.*, 481 U.S. at n.6).

In the present case, there is no issue of child support or alimony. Thus, in keeping with the consistently uniform decisions of the Court, and consistent with the direct enactment of Congress, Major Banks' disability benefits are protected by the anti-attachment provisions of 38 U.S.C. §5301.

Congress has positively required, by direct enactment, that the disabled veteran actually receive the disability benefits. The passage of the FUSFSPA did nothing to change the protections of the Veterans' Benefits Act (*Mansell v. Mansell*, 490 U.S. 581 [104 L.Ed.2d 675, 109 S.Ct. 2023] (1989).) Therefore, the reopening order in the present case is void.

III
38 U.S.C. §5301 IS PART OF A GENERALIZED CONGRESSIONAL PLAN FOR PROTECTING VETERAN'S DISABILITY BENEFITS FROM ANY FORM OF ATTACHMENT EXCEPT FOR CHILD SUPPORT

Congress has charged the Veterans Administration with management of benefits for service-connected disabled

veterans as its highest priority mission. (Senate Report No. 97-504 on the Omnibus Budget Reconciliation Act of 1982 (Pub. L.97-253), p.245). The Veterans' Benefits Act conforms to this generalized Congressional plan to protect veterans' disability benefits from state interference.

> "The basic purpose of the disability compensation program, throughout its history, has been one of providing relief from the impaired earning capacity of veterans disabled as the result of their military service. The amount of compensation payable varies according to the degree of disability which, in turn, is required by law to represent, to the extent practical, the average impairment in earning capacity resulting from such disability or combination of disabilities in civil occupations." (House Report No. 96-1155, p. 4, Veterans' Disability Compensation and Housing Benefits Amendments of 1980 (Public L. 96-385)).

In addition to providing at least some compensation for the injuries and disabilities that have been visited upon members in the service of their country, disability payments also benefit the nation as a whole. Disability payments help maintain a fit military force by encouraging those eligible for benefits to retire, rather than to conceal their disability and continue in active service for economic reasons. Protection of those disability benefits also helps preclude service members from concealing their impairments until they are transferred to a state that will not try to diminish the compensation by awarding part of it to a healthy former spouse. Like most of the other fringe benefits, they also facilitate recruitment. Furthermore, adequate disability benefits help avoid the possibility that disabled veterans will be a burden on local communities and other state and federal programs.

The thorough, thoughtful, and deliberate balance weighed by Congress (Senate Report No. 98-174,pp. 221-222 to accompany S-675, Department of Defense Authorization Act of 1984, (Pub. L. 98-94), 97 Stat. 614 (10 U.S.C. §§1461-1467) concerning payment of V.A. disability benefits is evinced by the singular treatment of retired military members. Other federal retirees who qualify for V.A. compensation are not required to waive a portion of their retirement pay to receive V.A. benefits.

Civil Service employees in the executive, legislative and judicial branches of government, certain foreign service retirees of the Department of State, and certain Central Intelligence Agency retirees can receive both full retirement pay and full V.A. compensation. (*Absher v. U.S.*, 9 Ct. Cl. 223, 224 (1985), aff'd, 805 F.2d 1025 (Fed.Cir., 1986), cert. den., 481 U.S. 1028 [107 S.Ct. 1953, 95 L.Ed.2d 526] (1987).) Military retirees may not (38 U.S.C. §5305).

Further evidence of the overall Congressional intent to protect V.A. disability benefits can be found in other federal programs. The Social Security Act waives federal immunity from attachment of federal pay, including military pay, for child support and alimony. (42 U.S.C. §659.) However, community property is specifically excluded from the definition of alimony. (42 U.S.C. §662[c].)

Congress allows garnishment of Civil Service retirement benefits for community property purposes. (Pub. L. 95-366, 92 Stat. 600, 5 U.S.C. §8345(j)). And, Congress allows garnishment of Foreign Service retirement for community property division (22 U.S.C. §§4044 et seq.) However, Congress, presumably for good and sufficient reasons, has enacted no comparable provision for benefits payable by the Veterans Administration.

This contention finds added support in the provision of a separate benefit for a disabled veteran's dependent spouse (38 U.S.C. §1115), a benefit which terminates on the last day of the calendar month in which an annulment or divorce occurs (38 U.S.C. §5112[b][2].)

Another significance of 38 U.S.C. §5301 in the present case, is that it speaks in clear terms concerning exemptions to the protection of the funds after receipt by the beneficiary. Section 5301 specifically states that the exemption from taxation does not extend to any property purchased in part or wholly out of the disability payments. However, there is no such exemption from the anti-attachment provisions for the community property claims of former spouses.

Furthermore, subdivision b of §5301 specifically **prohibits collection, by offset or otherwise**, out of the benefits except for amounts due to the federal government by reason of overpayments or illegal payments. Nevertheless, California's reopening order for community property division, without citing any specific statutory language, puts petitioner's ex-wife in a position even stronger than that of the federal government.

Congress is sensitive to the confidence placed in it by military personnel (Senate Report No. 98-174, pp. 221-222, *supra.*). Therefore, changes to the military retirement program must come as the product of thorough, thoughtful, and deliberate study that weighs heavily the impact of such changes on military force management and national security needs. When Congress intends to allow exemption from the anti-attachment policy, it specifically says so. Congress allows attachment of permanent investments for tax obligations. (§5301(a).) Congress also allows offset to recover overpayments and unlawful payments. (§5301(b).) However, nothing in any statute or decision of the Court has ever

allowed attachment or offset for collection of community property claims.

Until Congress chooses to act, its long-standing anti-attachment policy, as expressed in the Veterans' Benefits Act, FUSFSPA and the Social Security Act is controlling. A program as carefully balanced as the V.A. disability compensation system should not be disrupted by the vagaries of the laws of the fifty states. Yet, California's reopening of the final judgment after the mistaken *Casas* decision to allow community property division of petitioner's V.A. disability compensation does just that.

IV
OFFSETTING GARNISHMENT OF OTHER ASSETS CONSTITUTES A SEIZURE OF THE V.A. DISABILITY BENEFITS FORBIDDEN BY 38 U.S.C. §5301

California may not make an offsetting award from other assets. (*Wissner v. Wissner*, 338 U.S. 655, 659 (1951).) To do so would, in effect, anticipate the benefit in violation of the statute, just as would awarding a house or other property as an offset (*Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-589 (1979),) and as imposition of a constructive trust would operate as a forbidden "seizure." (*Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981).) The state court's attempt to limit the anti-attachment provisions because of equitable interests violates the unqualified sweep of the statute. Section 5301 prohibits, in the broadest of terms, any "*attachment, levy, or seizure by or under any legal or equitable process whatever*," even after receipt by the disabled veteran (*Ridgway, supra.*, 454 U.S. at 60.)

In *Wissner v. Wissner*, 338 U.S. 655 (1950), the Court found it unnecessary to decide whether California is entitled

to call Army pay community property. (*Id.*, 338 U.S. at 657 n.2.) Nevertheless, for two separate reasons, the Court held that the wife of a deceased Army officer had no community property interest in the proceeds of a National Service Life Insurance policy, the premiums of which were paid with community property.

The Court held that because the federal statute gave the service member the absolute right to designate the beneficiary, **the state may not interfere** with that designation by awarding the proceeds to another, or **by awarding an equivalent amount under some other theory**. (338 U.S. at 659.)

As an independent ground for reversing the California community property award of the benefits, the *Wissner* Court held that **the state judgment was in effect a seizure in violation of [former] 38 U.S.C. §816** (*Ibid.*) It is significant to note that the operative language of §816 is identical, word-for-word, to the operative language of §5301.

The *Wissner* court commented on the distinction between community property obligations and support obligations based upon particular needs in alimony and support cases. These comments eventually formed the basis of the holding of the Court in the recent case of *Rose v. Rose*, 481 U.S. 619 [107 S.Ct. 2029, 95 L.Ed.2d 599] (1987).

Concerning an offsetting award of other assets, the *Wissner* Court held:

> "Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." (338 U.S. at 659.)

Almost thirty years later, the Court again addressed an offsetting award of other property to compensate for federal pre-emption of state community property laws. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Court held that **an offsetting award would defeat the purpose of the statute barring anticipation of payments**. (*Id.*, at 588-590.)

Like anti-attachment provisions generally, §5301 insures that the benefits are actually received by the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process, notwithstanding any other law of any state. It prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of Congressional policy.

CONCLUSION

For these reasons, certiorari should be granted to address the federal pre-emption issue that California refuses to acknowledge.

Respectfully Submitted,

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July, 1992.

FILED
January 1, 1986
Joyce Russell Smith,
Clerk

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ATTORNEY FOR: Verna J. Banks

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
720 Ninth Street
Sacramento, California 95814

MARRIAGE OF

Case No.
748218

PETITIONER: VERNA JO BANKS
RESPONDENT: JOHN W. BANKS, II

JUDGMENT-RESERVED ISSUES
Dissolution

Date marital status ends: November 1, 1984

1. This proceeding was heard as follows: Contested
   a. Date: 4/24-26/85 & 7/29/85 Dept.: 7
   b. Judge: RICHARD K. PARK
   c. Petitioner present in court Attorney present in court: D.M. PERKOVICH
   d. Respondent present in court Attorney present in court: CLARENCE D. WALTERS

2. The court acquired jurisdiction of the respondent on 9/27/79 Respondent appeared

3. THE COURT ORDERS, GOOD CAUSE APPEARING:

a. Judgment of dissolution be entered. Marital status is terminated and the parties are restored to the status of unmarried persons on the following date: (Status Only Dissolution entered November 1, 1984).

4. THE COURT FURTHER ORDERS:

Jurisdiction is reserved over all other issues and all present orders remain in effect except as provided below.

The parties' stipulations recited in open court on April 26, 1985 and July 29, 1985, are incorporated herein as part of the Orders of the Court. The parties are hereby ordered to comply with the terms and conditions thereof.

Date: January 2,1986 /s/ PARK
Judge of the Superior Court

1. THE COURT ORDERS that of the funds on deposit in Attorney Walters' client trust account in the approximate amount of $14,351.14, including the Home Life Insurance Policy refund, $3,000.00 shall be awarded to Respondent as his sole and separate property and all of the remaining funds shall be awarded to Petitioner as her sole and separate property.

2. IT IS FURTHER ORDERED that each party shall retain a one-half interest in the following community property and such interest shall be awarded to the respective parties as their sole and separate property.

(a) The mineral rights reserved on the Reese Road property as described in the grant deed recorded with the Sacramento County Recorder's Office on November 8, 1984, Book 84 11- 8, page 1072, document number 194742, admitted into evidence as Petitioner's Exhibit 4 and more particularly described as follows:

Real property in the City of unincorporated area, County of Sacramento, State of California, described as:

AS TO AN UNDIVIDED 1/3rd INTEREST

Parcel A and Parcels 1 thru 23, inclusive, as said parcels are shown on that certain map entitled "Parcel 1 as shown on 49 P.M. 11 and a portion of the Southeast 1/4 Section 2, T. 7N, R.5, M.D.B.&M." filed for record in the office of the County Recorder, County of Sacramento on July 20, 1981 in Book 65 of Parcel Maps, Map No. 39.

EXCEPTING THEREFROM An undivided one-sixth interest in one hundred percent (100%) of All oil, asphaltum, minerals, hydrocarbon substances and geothermal rights in or on said land below a depth of 500 feet from the surface of said land, together with the right to produce develop, explore and extract said substances, but without however the right to entry on the surface of said land or within said 500 feet from the surface thereof

as reserved in the deed from Verna J. Banks to John W. Banks, II, as his separate property, dated July 11, 1979, recorded July 31, 1979, Book 7907-31, Official Records, Page 1783, as to all that portion being within Parcel 1 of Parcel Map Book 49, Map No. 11.

ALSO EXCEPTING THEREFROM AN UNDIVIDED TWO-SIXTH INTEREST in one Hundred percent (100%) of all oil, mineral, geothermal and similar right below a depth of five hundred (500 ft.) of existing surface elevation but shall have no right to surface entry, subject to all matters of record and all matters which would be disclosed by a survey or inspection of the real property as set forth in those certain deeds executed Real Estate Restoration, Inc., a California corporation and Merit Design, Inc., a California corporation, recorded in Book 8304-06, Pages 1298 & 1301 respectively.

(b) The 7.3% limited partnership interest in Auburn Equestrian Park Limited Partnership, which name was later changed to Auburn Bluffs, Limited, described in the Certificate of Limited Partnership of Auburn Equestrian Park recorded with the Sacramento County Recorder's Office on June 12, 1978, Book 7806, page 121896 thru page 121899, document number 88473 and admitted into evidence as Petitioner's Exhibit 8.

(c) The Frenchtown Hills property, subject to those encumbrances recorded against the property as designated on the preliminary title report issued by Placer Title Company dated January 23, 1985, marked for identification as Petitioner's Exhdibit [sic] 18, and more particularly described as follows:

Real property situated in the State of California, County of El Dorado, unincorporated area, described as:

Lots 1 through 23, 25, 27 through 30, inclusive as shown on that certain map entitled "Frenchtown Hills a Rural Subdivision", filed in the office of the County Recorder of said County on February 8, 1980 in Map Book "F" at page 113.

(d) Twenty (20) acres in Arkansas title to which shall be held as tenants in common by Petitioner and Respondent. The court shall retain jurisdiction over this asset to equally divide the community interest in the event Arkansas law does not provide for equal undivided ownership interests equivalent to a tenancy in common.

3. IT IS FURTHER ORDERED that of the Century Properties Fund XII, Limited Partnership Units shall be awarded to Petitioner as her sole and separate property.

4. IT IS FURTHER ORDERED that the following property shall be awarded to Respondent as his sole and separate property:

(a) The community residence, with the existing liens and encumbrances thereon, located at 4643 Paula Way, Fair Oaks, Sacramento County, California, and more particularly described
as:

Parcel F as shown on the parcel map recorded in Book 4 of Parcel Maps, Map No. 14, recorded in said County.

(b) Keogh account located in the Putnam Fund.

(c) 1977 Cadillac

(d) Proceeds from sale of Petitioner's 1977 Cadillac.

(e) 7.5% general partnership interest in Auburn Bluffs Limited

(f) All interests of J.L.C., Inc. or J.L.C. Partnership I in the Auburn Bluffs property.

(g) Any benefits Respondent may obtain by way of the proposed agreement and option between J.L.C. Enterprises, Inc. and Auburn Bluffs, Limited respecting the Reese Road property

5. IT IS FURTHER ORDERED that three (3) lots in the Auburn Bluffs subdivision are confirmed to Petitioner as her sole and separate property and more particularly described as follows:

Lots 20, 29 and 32 of Auburn Bluffs as shown on the Subdivision Map recorded March 29, 1984 in book N of Maps at page 91, Placer County Records.

6. IT IS FURTHER ORDERED that the court shall retain jurisdiction over Petitioner's retirement with the City of Sacramento and Respondent's retirement with the State of California.

7. IT IS FURTHER ORDERED that Respondent shall assume and hold Petitioner harmless

from all the community obligations and other debts listed on his financial declaration and community property declaration, attached to his pretrial statement both signed on January 8, 1985 and filed with the court, except that any community debts listed which are secured by a lien or deed of trust recorded against the Auburn Bluffs property or the Frenchtown Hills property as set forth in the Placer Title Company Preliminary Report of January 23, 1985, marked for identification as Petitioner's Exhibit 18, will stay with the property.

8. IT IS FURTHER ORDERED that each party shall bear their own attorneys' fees and costs with respect to all proceedings through July 29, 1985. The court shall retain jurisdiction to award any fees and costs incurred in obtaining entry or enforcement of this judgment and allocation of the pensions.

9. IT IS FURTHER ORDERED that the Order to Show Cause re Contempt filed February 7, 1985 shall be dropped and all claimed arrearages in spousal support shall be deemed satisfied by the division of funds held in Attorney Walters' client trust account as set forth hereinabove.

10. IT IS FURTHER ORDERED that each party shall execute any and all documents reasonably necessary to carry out the provisions of this judgment.

11. IT IS FURTHER ORDERED that each party shall hold the other party harmless from and shall defend them against any liability or litigation that might

arise from the property and/or debts assumed by the respective parties.

12. IT IS FURTHER ORDERED that if it shall hereafter be determined by a court of competent jurisdiction that either party is possessed of any community property not set forth herein, the party in possession of any such property shall pay to the other on demand an amount equal to one-half of the fair market value thereof.

13. IT IS FURTHER ORDERED that the parties shall equally divide the costs of preparation of the original and two copies of the court reporters transcript of the Stipulation recited on April 26, 1985.

14. WHEREAS, the issue of characterization and division of Respondent's military disability and retirement pension benefits having been submitted to the court for judicial determination, the court makes the following findings:

(a) Respondent entered the military on November 21, 1951.

(b) The parties married on April 17, 1954.

(c) Respondent retired from the military on December 1, 1971.

(d) The parties separated on June 25, 1979.

(e) The parties were married 17 years and 7 months of the 20 years Respondent was on active duty.

(f) Respondent suffered medical problems and elected to receive a portion of his retirement as a disability pension in approximately 1978.

(g) Respondent's percentage of disability was set at approximately 40%.

IT IS THEREFORE ORDERED THAT:

(a) The portion of Respondent's military retirement attributable to disability is not subject to division as community property, as governed by In re Marriage of Costo (1984) 156 CA3d 781.

(b) The community has a 87.9% interest in Respondent's military retirement.

(c) Petitioner is entitled to 43.95% of that portion of Respondent's retirement pay remaining after the amounts attributable to disability are deducted.

IT IS FURTHER ORDERED THAT the issue of Petitioner's right to reimbursement for her portion of the retirement pay which the Respondent received and spent after the date of separation is bifurcated from all other issues and the court retains jurisdiction for presentation of further evidence and argument at a further hearing to be reset by either party.

15. WHEREAS, the issue of characterization and division of personal property having been submitted to the court for judicial determination, IT IS THEREFORE ORDER THAT:

(a) The following items are confirmed to Respondent as his sole and separate property:

(1) Leather bedroom chairs received from Saregent Irvin.

(2) Two large J.B.L. speakers purchased with inherited funds.

(3) Chaffing dishes purchased with inherited funds.

(4) Bone china purchased with inherited funds.

(5) Two sets of snack glasses received from Japanese employees.

(b) All other items of personal property in which Respondent claimed a separate property interest at the time of the July 29, 1985 hearing are found to be community property.

(c) Petitioner shall be awarded the items of personal property in her possession.

(d) Respondent shall be awarded the items of personal property of his choice in his possession in an amount equal to the value of those items of personal property in Petitioner's possession.

(e) Respondent shall receive an additional credit in the amount of $3,000.00 which Respondent gave to Petitioner to establish a separate household. Said credit is to be offset against the value of the personal property in his possession.

(f) All items of community personal property in each party's possession shall be appraised by Alex Sabbadini, F.A.S.A. Petitioner and Respondent shall each pay one-half of Mr. Sabbadini's fees.

(g) The court shall retain jurisdiction over the determination of the values of the personal property items and any amount necessary to equalize the division of the personal property items in each party's possession. This issue shall be bifurcated from all other issues and

may be determined at a further hearing to be reset by either party.

APPROVED AS TO FORM:

/s/ PERKOVICH
D.M. PERKOVICH
Attorney for Petitioner

FILED
May 4, 1987
JOYCE RUSSELL SMITH,
CLERK

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO
720 Ninth Street
Sacramento, CA 95814

PETITIONER: VERNA JO BANKS Case No. 748218
RESPONDENT: JOHN W. BANKS, II

FINDINGS AND ORDER AFTER HEARING:
Division of Military Retirement Pay

This proceeding was heard as follows:

1. a. Date: April 15, 1987 Dept.: 13
b. Judge: William R. Ridgeway
Attorney present in court: D.M. PERKOVICH
Respondent present in court

On the Motion filed
Date: March 2, 1987 By: Petitioner

The court finds that pursuant to Casas v. Thompson (1986) 42 C3d 131, Respondent is ordered to pay each month to Petitioner, effective September 1, 1986, 43.95% of his gross military retirement pay. The Court further orders Respondent

to submit by May 4, 1987 a written request to the U.S. Air Force for a warrant each month stating both the gross amount and the net amount of his retirement pay. Respondent shall furnish the Court with a copy of said request.

Date: May 4, 1987

/s/ RIDGEWAY
Judge of the Superior Court
WILLIAM R. RIDGEWAY

Date: April 17, 1987

/s/ PERKOVICH
D.M. PERKOVICH
Attorney for Petitioner

FILED
December 7, 1990

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Attorney for Petitioner: VERNA J. BANKS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

VERNA J. BANKS,	)	CASE NO. 748218
	)	Dept. 13
Petitioner,	)	
v.	)	
	)	ORDER ON
	)	SUBMITTED
JOHN W. BANKS, II,	)	MATTERS
	)	
Respondent.	)	
	)	

The above-entitled matter came on for hearing on July 6, August 1, and October 12, 1990 in Department 13 of the Superior Court of California, County of Sacramento, the Honorable Vance Raye presiding. Upon considering the moving and opposing papers and upon hearing oral argument, the matter was taken under submission. On October 30, 1990, the court issued its tentative ruling. No objection being filed, the tentative ruling became the court's order.

For good cause appearing,

IT IS HEREBY ORDERED:

1. Respondent's Motion of Set Aside the Judgment entered May 4, 1987 ordering respondent to pay 43.95 percent of his gross military retirement pay to petitioner each month is DENIED;

2. Petitioner's request for a determination of arrearages is GRANTED. Arrearages and interest to June 6, 1990 are determined to be in the sum of $12,156.81.

3. Petitioner's request for enforcement orders are granted as follows:

Respondent is ordered to endorse the warrant, or other instrument, received in settlement of respondent's claims against the State of California, Department of Education, et al. The proceeds of the settlement shall be deposited in a blocked interest bearing account under the control of petitioner's counsel. Disbursements shall be made from the account as follows:

a. $12,156.81 shall be paid to petitioner in satisfaction of prior orders and as payment of arrears and interest through June 30, 1990;

b. $20,000.00 shall be placed in a separate, interest bearing blocked account, controlled by petitioner's attorney, and shall remain in such account until the respondent develops a plan, approved by the Court, to ensure the timely payment of amounts due from respondent's military retirement under the judgment entered on May 4, 1987. Pending the approval of such plans, payments required to ensure compliance with the Court's judgment shall be made monthly to petitioner from such account;

c. $3,850.00 shall be paid to petitioner's attorney as and for attorney's fees;

d. The balance in the account, within thirty (30) days after the above disbursements, shall be paid to respondent and

his attorney, Carlos Alcala, by check payable to them jointly and requiring the endorsement of each.

Dated: Nov 1991

/s/ RAYE
Judge of the Superior Court
(Vance Raye)

Filed
January 31,1992
Court of Appeal 3rd District
Robert L. Liston, Clerk

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In Re The Marriage of VERNA J. and JOHN W. BANKS.	)	C010194
	)	
	)	(Super. Ct.No.748218)
VERNA J. BANKS, Respondent,	)	
v.	)	
JOHN W. BANKS II, Appellant.	)	

This is an appeal from an order after judgment in an action for dissolution of a marriage. Appellant (Husband) moved to set aside a three-year old judgment awarding respondent (Wife) a community property share of his gross military retirement pay. He claimed the order is void for lack of jurisdiction because some of his military retirement pay is attributable to disability payments not subject to community property division. The trial court denied Husband's motion and he appeals. We will affirm the order denying the motion to set aside the judgment.

FACTS

On March 2, 1987, Wife moved for an order dividing Husband's military retirement pay pursuant to the ruling in Casas v. Thompson (1986) 42 Cal.3d 131. On May 4, 1987, judgment was entered dividing Husband's military retirement pay and directing him to pay each month to Wife 43.95 percent of his gross retirement pay. The judgment was explicitly founded upon Casas. No appeal was taken from the judgment.

On June 12, 1990, Wife sought to obtain a declaration of arrearage under the judgment and to enforce it by levying upon proceeds of a settlement in a tort action between husband and his former employer. On June 21, 1990, Husband replied with a motion to set aside the judgment on the ground it is void because some of his military retirement pay is attributable to disability payments not subject to community property division under Mansell v. Mansell (1989) 490 U.S. 581 [104 L.Ed.2d 675] (Mansell I), which overruled Casas. The trial court found no lack of jurisdiction warranting a determination that the judgment founded on Casas was void and denied Husband's motion.

DISCUSSION

Husband contends that the trial court erred in denying his motion to set aside the judgment. He argues that federal statutes preempt the California community property law as to military disability benefit payments. He asserts that this renders erroneous the judgment dividing his military retirement pay based, among other things, upon his disability benefit payments. Wife replies here, as in the trial court, that

the arguments are barred by res judicata. Husband rejoins that the judgment is void for lack of subject matter jurisdiction.[1]

Husband's counsel unsuccessfully tendered the same contention in In re Marriage of Mansell (1989) 217 Cal.App.3d 219, 227-229 (Mansell II).[2]The court found no lack of subject matter jurisdiction, relying upon a distiction in In Re Marriage of Thomas (1984) 156 Cal.App.3d 631, 636 between subject matter jurisdiction preemption and the preemption of state law by federal law. Husband suggests that

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[1]We assume for the sake of discussion that a lack of subject matter jurisdiction would present a valid basis for overturning a prior final judgment per se. (See, e.g., 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 194, p. 630; but see, e.g., Rest.2d Judgments, § 12; Stoll v. Gottlieb (19838) 305 U.S. 165 [83 L.Ed. 104]; Levy v. Cohen (1977) 19 Cal.3d 165, 172-174.) Husband may also be tendering a claim that regardless of subject matter jurisdiction collateral attack should be permitted on the ground that the judgment is an act in excess of jurisdiction. If so we would reject that claim on the ground that he makes no showing of the peculiar requirements for permitting such an attack. (See 2 Witkin, Cal. Procedure, supra, Jurisdiction, § 271, p. 670.)

[2] Husband's counsel improperly failed to mention this authority in his 48 page opening brief. Chided by opposing counsel for this lack of candor, husband's counsel admits the omission was not inadvertent and excuses himself on the ground the court of appeal in Mansell II refused to address what he perceives as the issue and was engaged in "judicial legerdemain." We expect counsel to disclose California legal authority known to be directly adverse to the position of his client. (See Rules Prof. Conduct, rule 7-105; People v. Crafts (1970) 13 Cal.App.3d 457, 460; see generally, Model Rules of Prof. Conduct, rule 3.3.) Counsel is free to attempt to distinguish or attack precedent, but knowingly failing to attend to it, at best, wastes the time of opposing counsel and the court.

the distinction is "*sui generis* to military retirement cases." (Orig. emphasis.)

The preemption of inferior by higher law as a result of a conflict is commonplace, given, e.g., the hierarchies of constitutions, statutes, common law and of federal, state, and local lawgivers. Even where preemption arises from a conflict with the paramount constitutional law the ordinary rule is that a judgment rendered based upon the lesser law preempted by the conflict is not void and may not be collaterally challenged on the ground of lack of jurisdiction. (See, e.g., Chicot County Drainage District v. Baxter State Bank (1940) 308 U.S. 371 [84 L.Ed. 329]; Rescue Army v. Municiple Court (1946) 28 Cal.2d 460, 463-464; Annot., Validity and Effect of Judgment Based Upon Erroneous View as to Constitutionality or Validity of a Statute or Ordinance Going to the Merits (1947) 167 A.L.R. 517.)[3]

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[3] Husband suggests that federal law preemption of any kind renders an inconsistent state judgment void. He points to Hoffman v. United States (9th Cir. 1968) 391 F.2d 195 concerning National Service Life Insurance and Ridgway v. Ridgway (1981) 454 U.S. 46 [70 L.Ed.2d 39] concerning Servicemen's Group Life Insurance policies. Neither case is apposite; nor does either discuss res judicata. Both concern disputes between a beneficiary designated by the deceased policyholder and claimants seeking policy benefits based upon the disobedience by the deceased policyholder of a state court judgment directing him to designate the claimants as beneficiaries. Both cases invoive efforts to attach polict benefits in derogation a federal anti-attachment statute. Neither case presents a question of holding a final judgment void as between the parties thereto. The questions posed in Hoffman and Ridgway are the consequences of judgments with respect to nonparties in future proceedings.

Subject matter jurisdiction preemption is the unusual variety.

> "It is generally true that a judgment by a court of competentjurisdiction bears a presumption of regularity and is not there-after subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack." (Kalb v. Feuerstein (1940) 308 U.S. 433, 438-439 [84 L.Ed. 370, 374, fns. omitted.)

The manner of specifying such a prohibition in Kalb was plain, the federal statue said that the filing of a bankruptcy petition immediately subjected the farmer and his property "to the exclusive jurisdiction of the [bankruptcy] court." (308 U.S. at p. 440 [84 L.Ed. at p. 375, emph. added.) This language expressly invokes subject matter jurisdiction. "The provisions of law investing a court or other tribunal with authority to adjudicate a type of controversy are referred to as the rules of subject matter jurisdiction and sometimes as rules of 'competency' or competence.'" (Rest.2d Judgments, § 11, com. (a), p. 109.) The federal courts under the federal Constitution have subject matter jurisdiction only where it has been delegated. "In contrast, the principal trial

court in state court systems is a court of general jurisdiction, i.e., it has not exclusively consigned to some other tribunal." (Id., at p. 108.) The statutory language in Kalb exclusively consigned the authority to adjudicate the controversy to the bankruptcy court. Husband fails to identify similar statutory language prohibiting the exercise of state court jurisdiction over matters of disputed property interests in military retirement pay; accordingly he offer no persuasive reason to depart from the holding in Mansell II.

Nonetheless, Husband unaccountably suggests that Mansell II and Thomas "fully support" his view of federal subject matter preemption. His first argument is founded on a sentence in Mansell I which says that prior to the Uniformed Services Former Spouses' Protection Act "federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay..." (480 U.S. at p. 588 [104 L.Ed.2d at p. 684].) He suggests that this language compels the conclusion that the underlying statutory preemption identified in McCarty v. McCarty (1981) 453 U.S. 210 [69 L.Ed.2d 589] is one of subject matter jurisdiction within the two part scheme of Mansell II and Thomas.

This argument is apparently founded upon the adverb "completely." The passing usage is completely unavailing. There is nothing in the context of that usage that shows it was selected for the point in issue. The contrary implication is to be found in footnote 5 of the Mansell I opinion: "Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction." (480 U.S. at p. 586 [104 L.Ed.2d at p. 684].)

Husband's remaining argument is that federal preemption of jurisdiction arises from the anti-attachment

clause which protects a veteran's receipt of disability benefits, 38 United States Code section 3101 (a) (now § 5301). It provides that veteran's benefits "shall not be assignable except to the extent specifically authorized by law, and ... shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the [veteran]." (Ibid.) Husband argues that this language works a preemption of California community property law to the extent that it would divide community property in light of the value attributable to the disability portion of a veteran's military retirement pay. Assuming for the sake of discussion that he is correct,[4] Husband fails to explain why the result of this language goes to subject matter jurisdiction rather than the ordinary preemption arising from a conflict with higher law.

We discern nothing in the language that suggests that a preemption, if any, founded on this provision would work a limitation in subject matter jurisdiction. There is no language addressed to the jurisdiction of the state courts by the assignment of exclusive jurisdiction to some other forum. Nor does it address the question whether judicial acts taken with respect to division of military retirement are subject to collateral attack. Rather the provision addresses otherwise available remedies which might be invoked under the general law of civil judgments. No claim is made that the order here seeks to levy upon disability pay.

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[4] The majority opinion in Mansell I eschewed resolving the question whether this provision also occasions a preemption. (Mansell I, 490 U.S. at p. 587, fn. 6 [104 L.Ed.2d at p.684].) The dissenters in Mansell I expressed the view that it does not work a preclusion of all consideration of the existence of such benefits but only protects the disability benefits from attachment. (490 U.S. at p. 603, dis. opn of O'Connor, J. [104 L.Ed.2d at p. 694].)

DISPOSITION

Husband supplies no persuasive reason to depart from the precedents of Mansell II and Thomas. Accordingly, the order denying vacation of the judgment is affirmed.

/s/BLEASE ,

Acting P.J.

We concur:

/s/SIMS , J.

/s/MARLER , J.

Third Appellate District No. C010194
S025577

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

VERNA J. BANKS, Respondent

V.

JOHN W. BANKS II, Appellant

SUPREME COURT
FILED
APR 15, 1982
Robert Wandruff Clerk
Deputy

Appellant's petition for review DENIED.

/S/ LUCAS
Chief Justice

TITLE 10, U.S.C.A. §1408

§1408. Payment of retired pay in compliance with court orders

(a) DEFINITIONS.-- IN THIS SECTION:

(1) The term "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)));
or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which-

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required

by law in order to receive compensation under title 5 or title 38;";

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term 'retired pay' includes retainer pay.

(b) EFFECTIVE SERVICE OF PROCESS.-- FOR THE PURPOSES OF THIS SECTION--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is

personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the

Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) AUTHORITY FOR COURT TO TREAT RETIRED PAT AS PROPERTY OF THE MEMBER AND SPOUSE.--

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any

proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of

(A) his residence, other than because of military assignment, in the territorial jurisdiction of the court,

(B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) PAYMENTS BY SECRETARY CONCERNED TO SPOUSE OR FORMER SPOUSE.--

(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) LIMITATIONS.--

(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders

on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired, pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable

retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the

maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) IMMUNITY OF OFFICERS AND EMPLOYEES OF UNITED STATES.--

(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) NOTICE TO MEMBER OF SERVICE OF COURT ORDER ON SECRETARY CONCERNED.--

A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) REGULATIONS.--

The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

TITLE 38 U.S.C. §1110. Basic Entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a pre-existing injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or pre-existing injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

TITLE 38 U.S.C. §1114. Rates of wartime disability compensation

For purpose of section 1110 of this title--

(a) if and while the disability is rated 10 percent the monthly compensation shall be $71;

(b) if and while the disability is rated 20 percent the monthly compensation shall be $133;

(c) if and while the disability is rated 30 percent the monthly compensation shall be $202;

(d) if and while the disability is rated 40 percent the monthly compensation shall be $289;

(e) if and while the disability is rated 50 percent the monthly compensation shall be $410;

(f) if and while the disability is rated 60 percent the monthly compensation shall be $516;

(g) if and while the disability is rated 70 percent the monthly compensation shall be $652;

(h) if and while the disability is rate 80 percent the monthly compensation shall be $754;

(i) if and while the disability is rated 90 percent the monthly compensation shall be $849;

(j) if and while the disability is rated as total the month compensation shall be $1,411;

TITLE 38 U.S.C. §1115. Additional compensation for dependents

Any veteran entitled to compensation at the rates provided in section 1114 of this title, and whose disability is rated not less than 30 percent shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and--

(A) has a spouse but not child, $82;

(B) has a spouse and one or more children, $138 plus $44 for each child in excess of one;

(C) has no spouse but one or more children, $57 plus $44 for each child in excess of one;

(D) has a parent dependent upon veteran for support, then, in addition to the above amounts, $67 for each parent so dependent;

(E) notwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is (i) a patient in a nursing home or (ii) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person, shall be $149 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and

(F) notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be $126 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

(2) If and while rated partially disabled, but not less than 30 percent in an amount having the same ratio to the amount specified in paragraph (1) of this section as the degree of disability bears to total disability, the amounts payable under this paragraph, if not a multiple of $1, shall be rounded down to the nearest dollar.

TITLE 38 U.S.C. §1155. Authority for schedule for rating disabilities

The Administrator shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The

schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent. The Administrator shall from time to time readjust this schedule of ratings in accordance with experience.

TITLE 38 U.S.C. §5112. Effective dates of reductions and discontinuances

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension--

(2) by reason of marriage annulment, divorce, or death of a dependent of a payee shall be the last day of the month in which such marriage, annulment, divorce, or death occurs;

TITLE 38 U.S.C. §5301. Nonassignability and exempt status of benefits

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments.

The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity. For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving his or benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or his estate; or (2) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws to such beneficiary or his estate to his dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or liens, or interest on such premiums or liens or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the

Veterans' Administration but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration of of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 5305 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Veterans' Administration of such person's eligibility for such pension or compensation, the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

TITLE 38 U.S.C. §5305. Waiver of retired pay

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of any such waiver, the amount

waived, and the effective date of the reduction in retired or retirement pay.

TITLE 42 U.S.C. §659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process.

Notwithstanding any other provision of law (including section 407 of this title) effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

TITLE 42 U.S.C. §662. Definitions

For purposes of section 659 of this title--[enforcement of individual's legal obligations to provide child support or make alimony payments]

(c) The term "alimony," when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite,

maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

California Civil Code §4800(a). Division of Community Estate.

(a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this section, the court shall, either in its judgment of dissolution of marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally. For purposes of making this division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community estate of the parties in an equitable manner.

For the purposes of division and in confirming or assigning the liabilities of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties in accordance with subdivision (c).

As used in this section, "community estate" includes both the community and quasi-community assets and liabilities of the parties.

CALIFORNIA CODE OF CIVIL PROCEDURE, §473.

Amending Pleadings-Continuance-Relief From Mistake, Inadvertence, Surprise or Excusable Neglect; Time Limit; Affidavit of Merits Not Required-Correcting Clerical Errors-Setting Aside Void Judgments or Orders.

The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading

proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, order or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment entered against his or her client, unless the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

Whenever the court grants relief from a default or default judgment based on any of the provisions of this

section, the court may: (1) impose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or defaulting party, (2) direct that an offending attorney pay an amount no greater than one thousand dollars ($1,000) to the State Bar Client Security Fund or (3) grant such other relief as is appropriate.

However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.